IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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| ALFRED J. PRITCHARD, *Appellant,* *vs.* GEORGE K. McLEOD, FAIRHAVEN WATER COMPANY, a corporation, JOHN DOE and RICHARD ROE, *Appellees.* | No. 2206. |

## Brief of Appellant

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### STATEMENT OF THE CASE.

I.

The appellant, Alfred J. Pritchard, brought this suit below alleging in his complaint:

1. Ownership in himself of certain real and personal property (Paragraph III of Complaint, Record p. 2).

2. An agreement in writing between Pritchard and George K. McLeod, one of the appellees, for the

purchase by McLeod of all of said property (Paragraph IV of Complaint, Id. p. 2).

3. The execution and delivery by McLeod to Pritchard of two promissory notes in the agreement mentioned aggregating $4,000, both maturing at a date prior to commencement of suit, and that Pritchard is holder of said notes (Paragraph V of Complaint, Id. p. 2).

4. The payment by McLeod to Pritchard of the sum of $1,000 mentioned in the agreement. (Paragraph VI of Complaint, Id. p. 3).

5. The delivery of the personal property mentioned in the agreement, to McLeod; and the description of the real property and mining claims mentioned in the agreement. (Paragraph VII of Complaint, Id. p. 3.)

6. (a) The neglect and refusal of McLeod to pay said notes or to pay the 25% of the gross output of gold from any of the mining claims mentioned in the agreement until the sum of $25,000 should be paid or at all;

(b) That it was understood and agreed that said $25,000 mentioned in said agreement should be paid within a reasonable time;

(c) That more than a reasonable time has elapsed since the making of the agreement;

(d) That McLeod has neglected to mine said premises or to extract gold therefrom whereby, and on account of which, all of said moneys are now due and payable. (Paragraph VIII of Complaint, Id. pp. 3, 4.)

7. That Pritchard has always been ready and willing to perform the agreement mentioned on his part and is so willing, on being paid remainder of purchase money with interest from date of filing of this complaint, to convey said premises as provided in the agreement and to let McLeod into the possession of said premises and the rents and profits thereof from date of agreement. (Paragraph IX of Complaint, Id. p. 4.)

8. Tender of deed to premises by Pritchard to McLeod July 26, 1912; refusal of McLeod to accept same or pay balance of purchase price. (Paragraph X of Complaint.)

9. That The Fairhaven Water Company, a corporation, John Doe and Richard Roe, claim some right, title and interest in and to said premises, but such claims, if any, are junior and subordinate to rights and claims of Pritchard. (Paragraph XI of Complaint.)

The prayer of the complaint is for judgment:

(1) That McLeod performs said agreement and pay balance of purchase money with interest and costs;

(2) That if McLeod will not accept conveyances and pay purchase money, then the premises be sold and proceeds be applied to payment of same with costs;

(3) That McLeod be required to pay the deficiency, if any.

The agreement dated April 7, 1908, is in brief as follows:

Pritchard agrees to sell and McLeod agrees to buy certain placer mining claims and personal property, lots and water rights owned by Pritchard in the Fairhaven Mining District, District of Alaska, for $30,000, upon the follows terms and conditions:

(1) $1,000 cash, the receipt whereof is acknowledged;

(2) $1,500 note due and payable November 6, 1908;

(3) $2,500 note due and payable April 6, 1909;

(4) 25% of gross output of gold taken from any of the claims sold by Pritchard to McLeod, to be

paid upon demand to Pritchard until sum of $25,000 is paid in full;

(5) That Pritchard upon his return to Seattle will execute quit-claim deeds subject to conditions of agreement in favor of McLeod to cover mining claims, lots and water rights and bill of sale of personal property;

(6) Proceeds of any of certain of personal property sold by agent of Pritchard previous to date of agreement to belong to Pritchard;

(7) Proceeds of any articles sold after date of agreement to belong to McLeod;

(8) * * *

(9) Pritchard will execute an order to his agent to turn over everything to McLeod;

(10) The intent and purpose of agreement is Pritchard sells to McLeod all his real and personal property then owned by Pritchard in Fairhaven Mining District and undertake to execute all necessary deeds and transfers when called upon to do so (excepting a certain named placer mining claim). (Record p. 6 8..)

II.

The appellees, George K. McLeod and Fairhaven Water Company, defendants below, were duly served

with summons, and thereafter separately entered a general appearance and separately demurred to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The lower court sustained the demurrer, the plaintiff below declined to amend his complaint and a judgment of dismissal with costs to defendant was thereupon rendered and entered by the court. From this judgment plaintiff below appeals.

## SPECIFICATIONS OF ERRORS.

First: That the lower court erred in sustaining the demurrer of defendants.

Second: That the lower court erred in filing and entering its final decree and judgment dismissing said action in favor of defendants and against plaintiff, over the objection of plaintiff.

## ARGUMENT.

The Contract. The contract pleaded discloses on its face that it is not an option; that is, "an offer to sell coupled with an agreement to hold open for acceptance for the time specified, such agreement being supported by a valuable consideration" (39 *Cyc.* 1232); and which offer must be accepted within a reasonable time where no time is specified (39 *Cyc.* 1241); or as the District Court of Alaska, Second Division, defines it in *Montgomery vs. Waldeck,* 2 Alaska Reports 585: " 'The obligation by which one binds himself to sell and leaves it discretionary with the other party to buy, is what is termed in law an 'option,' which is simply a contract by which the owner of the property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time,' *Black vs. Maddox,* 104 Ga. 157, 30 S. E. 723, citing *Ide vs. Leiser,* 10 Mont. 5, 24 Pac. 695."

The written instrument must be construed so as to carry into effect the intention of the parties and in the case at bar that intention, as such, is definitely set forth in the contract under consideration, wherein it recites that "the party of the first part *agrees to sell* and the party of the second part

*agrees to buy"* the property described in the agreement (Record p. 6); and further reciting that the 25% of the gross output taken from any of the claims or fractions of claims *sold* by the party of the first part to the aforesaid party of the second part to be paid over upon demand to said party of the first part until the sum of $25,000 (balance of the purchase price) is paid in full (Paragraph numbered 4 of Agreement, Record p. 7); and further recites that "*the intention and purpose of the agreement is that the party of the first part sells to the party of the second part* all his real and personal property" * * * (Paragraph numbered 10 of Agreement, Record p. 7).

The consideration supporting the agreement is the mutual obligation of the parties, the absolute agreement on the one part to sell and on the other part to buy, for the sum of $30,000.00, and payment of $1,000.00 on account of that purchase price at the date of the agreement, the receipt whereof is recited and acknowledged in the instrument itself.

The covenants to be performed on the part of the vendor are that the vendor will, upon his return to Seattle, execute quit-claim deeds of mining claims, lots and water rights subject to the conditions of the agreement and bill of sale of personal property

(Paragraph numbered 5 of Agreement, Record p. 7) and will execute an order to his agent to turn over everything to vendee (Paragraph numbered 9 of Agreement, Record p. 7) and will execute all necessary deeds and transfers *when called upon to do so* (Paragraph numbered 10 of Agreement, Record p. 7); the covenants on the part of vendee are the execution and delivery of two promissory notes maturing on days certain aggregating $4,000.00 (Paragraphs numbered 2 and 3 of Agreement, Record p. 6); an implied agreement on the part of vendee to operate the mining claims for the purpose of extracting gold therefrom and the payment to vendor of 25% of gross output of the gold taken from any of the claims until the sum of $25,000.00 is paid in full. (Paragraph numbered 4 of Agreement, Record pp. 6 and 7).

The covenant by the vendor to make the necessary conveyances is not a condition precedent to performance by vendee for such conveyance under the express terms of the agreement are to be made by vendor "when called upon to do so." (Paragraph numbered 10 of Agreement, Record p. 8).

An agreement on the part of vendee to operate the mines for the purpose of extracting gold therefrom is necessarily implied from the agreement because it is only out of the funds derived from such

operation that the $25,000.00, balance of the purchase price, is to be paid—if there is not an implied agreement upon the part of the vendee to operate the mining claims, then we have this situation: the vendee can call upon the vendor to make the necessary conveyances, and the vendor must make such conveyances, when so called upon, as the making of such conveyances is not subject to any condition precedent to be performed by the vendee; and the vendee would then acquire the property for the sum of $5,000.00, to-wit: $1,000.00 cash and $4,000.00 in notes, when in fact the purchase price agreed to be accepted and paid is the sum of $30,000.00.

*Genet vs. Delaware & Hudson Canal Co.*, 136 N. Y. 593, 32 N. E. 1078.

The consideration moving the vendor was not only the payment of the $1,000.00 cash and the execution and delivery of the notes but also 25% of the prospective output of the mining claims which vendee agreed to pay but which could not be realized in whole or in part, in any event, unless vendee would, in fact, work the mining claims.

Appellant does not contend that the vendee agreed by implication or otherwise under the terms of the agreement that the mining claims would produce the sum of $100,000.00, 25% of which was to be

paid vendor or that he would operate the mining claims any longer than a prudent man would be justified in so doing considering the cost and output of such operation.

Appellant's contention is that the vendee under the agreement agreed that he would operate the mining claims and pay appellant 25% of the gross output at least so long as the output exceeded 25% of the cost of operation.

In *Montgomery vs. Waldeck*, *supra*, the agreement to sell and convey certain mining property in Alaska was signed by the vendor alone, which, the court says, "indicates an intention to absolutely bind the plaintiffs to sell and convey but to leave the defendant free to purchase or not." The court further says: "Turning to the agreement itself, we find in the second and third paragraphs the usual covenant on the side of the plaintiffs for a consideration to sell and convey certain lands to the defendant within a certain period, with a corresponding covenant on defendant's part, in consideration of the plaintiff's covenants, to purchase said lands within the same period. If this were all of the agreement, and defendant had signed the agreement, the liability of the defendant in this action would, I conceive under the evidence, be fixed."

In the case at bar the agreement is that vendor agrees to sell and vendee agrees to buy, and both have signed the agreement. Under the construction given such agreements in Alaska, the agreement pleaded is an absolute one to buy and sell and not an *option.*

In *Ray vs. Hodge,* 13 Pac. (Or.) 599, the plaintiffs had assigned half interest in a quick silver lease to Hodge, defendant's testator, for the following consideration: $750.00 cash, $1,250.00 to each of the plaintiffs when 250 flasks of quick silver produced. and upon a suit to recover the deferred payment, it was held that, in the absence of a showing that 250 flasks had been produced, the vendor could not recover from the vendee the amount stipulated without proving that the vendee had failed to make reasonable efforts to operate the mine in view of the outlay attending it and the prospects of its development.

In the case of *Toombs vs. Consolidated Poe Mining Company,* 15 Nev. 444, the owners of the mining company, then unincorporated, entered into a contract with Toombs whereby it was agreed that the latter should build a quartz mill at an estimated cost of ten thousand dollars for the purpose of working the ores of the company's mines; the mill, when, completed, to be the property of Toombs and the members of the mining company. Subsequently the mining

company was incorporated under the same name, with Toombs' consent. Toombs built the mill, and after the incorporation it was accepted by the proper officers of the mining company. Toombs was paid the estimated cost and by an instrument under seal called therein "a deed and account of settlement between the parties" it was agreed that the mill had cost five thousand dollars more than the original estimate and in satisfaction of said amount the following stipulation was inserted in and made a part of the conveyance from Toombs to the mining company, to-wit:

"Said first party (Poe company) hereby agrees and covenants that out of the first proceeds of crushing and reducing ores of gold and silver in said mill, from its said mine, after the payment of the expenses of working its said mill and mine, it will pay to the said second party (plaintiff), his heirs or assigns, the sum of two thousand five hundred seventy-five dollars in United States gold coin, with interest thereon until the payment of such interest and principal of note of — percentum per month from date of these presents; but such sum of two thousand five hundred seventy-five dollars shall not be a debt otherwise collectible of first part, until the proceeds of its mill and mine, over expenses, will pay such sum and interest, or part thereof, and then only to the extent of such part over such expenses. * * *"

The plaintiff Toombs sought to enforce a vendor's lien upon the mill and mill site for the deferred payment. There were no net proceeds derived from

working of the mine, and it was held by the court (syllabus) "that plaintiff had no right of action for the money mentioned in the agreement, or for the enforcement of a vendor's lien." The court in its decision, at page 488, says:

"We express no opinion as to what plaintiff's right or remedies would have been if the inability to pay from net proceeds had been caused by the fault of the company, because that is not alleged or claimed. *It was the duty of the company, under the covenants stated in the deed, to work the mine*, and by proper means extract the gold and silver from the ores."

In the case of *Skidmore vs. Eikenberry*, 53 Iowa 621, the contract was in the following language:

"In case of finding good, merchantable coal, not less than four feet in thickness, in shaft now being sunk on land this day bought by Mayberry Skidmore, I promise to pay Mayberry Skidmore two hundred thirty-two dollars and eighteen cents, with ten per cent interest from December 1, 1876, on April 1, 1877; if not so found this obligation to be void." There were two other similar obligations, the three aggregating fifteen hundred and sixty-one dollars. A suit was brought for the recovery of sums mentioned in these obligations and the petition alleged that if the defendant did not strike coal four feet in thickness in said shaft it was owing to his negligence in not sinking the shaft to a sufficient depth. The trial court instructed the jury as follows, *inter alia:*

"Under the contract in question in this case, if you find said note was given as part consideration for the purchase of the eighty acres on which said shaft was located and that the defendant was engaged in

sinking a shaft on said land at the time under the lease in evidence, in this case, then, under this contract *the defendant would be bound to make a reasonable effort to find coal of the character described in the contract, and if he neglected so to do, then he would be liable under the contract for said money.*"

The Supreme Court of Iowa, in the case on appeal, as cited above, referring to the instructions to the jury, including the one set out above, say:

"We think they place a proper construction on the contract and announce correct rules of law. The defendant might have been under obligation to sink the shaft to the lowest practicable depth, if he had been certain of finding the requisite vein of coal at that depth. But there is no rule of law which requires him to hazard his money to such an extent upon an uncertainty. All that the law requires is that he shall act in good faith and exercise reasonable diligence and use reasonable exertions in view of all the surrounding circumstances to find the specified vein. The law cannot define absolutely the depth to which the defendant should go, nor the efforts which he should exert. These are questions of fact for the jury, to be determined under the general direction that the exertions must be reasonable in view of the circumstances."

In the case of *Oliphant vs. Woodburn Coal & Mining Company*, 63 Iowa 332, the plaintiff sought to recover of defendant upon a written promise to pay money when it "should succeed in sinking a shaft on its leased lands and developing a paying vein of coal," the contract being silent as to when the com-

pany should sink the shaft or as to what efforts it should make to do so, except that it provided that the company should "use all necessary efforts to sell stock to raise sufficient money to dig a shaft." The court say, at page 337:

"But the raising of money by sale of stock would not of itself have caused the plaintiff's claim to mature. The officers still had a discretion to be exercised, in view of the circumstances, as they should appear from day to day. It may be conceded that there was an implied obligation to act in good faith toward the plaintiff, or, what is nearly the same thing, not to abuse their discretion. But they did not, we think, undertake to contract away their discretion. They had been elected for the express purpose of exercising it. Their experience, knowledge, judgment and skill had been contracted for by the company, and we will not presume from anything we find in the contract that they intended to subordinate their judgment to what they might suppose would be that of a jury. If, then, they did not contract away their discretion, it became, at most, as the court held, a question of the want of good faith or abuse of discretion. It is true the court went a little further and held that the plaintiff, in order to recover, should also show that his claim would have become payable, if a fair and reasonable discretion had been exercised in the work. *Possibly, if the plaintiff had shown a want of good faith or abuse of discretion, his claim should be deemed to have become payable without any further showing, but it is immaterial to determine this. We hold that the plaintiff could not recover without showing want of good faith or abuse of discretion*, and we cannot find the slightest evidence of either. The company did not sell out, so as to put it out of its power to discover coal, nor did it refuse to proceed

after having discovered it. It retained its lease and pursued its work of prospecting, preparatory to determining where and when to sink a shaft. It might perhaps have prospected more thoroughly by sinking a shaft instead of drilling. But it could not do this without the means, and the evidence not only fails entirely to show that it had the means, but tends to show affirmatively otherwise."

There is no opinion of the lower court in the record and the writer of this brief is ignorant of the grounds of the lower court's ruling.

The only theory, appearing to appellant, under which it could be held that the complaint fails to state a cause of action is that the agreement pleaded was not an executory contract of sale, but a mere *option* to mine the premises, discretionary with vendee whether he would elect to undertake the same, the balance of the purchase price only to mature in the event of his electing to mine the premises, and in the further event of there being any gross output, 25 per cent of the proceeds of which would then be payable to the vendor.

But such theory would overlook the *entirety of the agreement* on the part of the vendor to sell, and the vendee to buy, the mining claims and other property and the acceptance of the option (if such it were) by vendee by the delivery to vendee of the personal

property alleged in the complaint and admitted by demurrer.

If the agreement were an option originally, then by the acceptance by vendee it became a contract of sale. The option, when accepted, changes the option into a contract of sale binding upon both parties. An option to purchase is a continuing offer by the vendor to sell, and its acceptance by the purchaser completes the contract, exhausts the option and estops the purchaser from subsequently repudiating it or choosing another alternative.

39 *Cyc.* 1243.

*Castlecreek Water Co. vs. City of Aspin,* 146 Fed. 8, C. C. A., 8th Circuit.

Acceptance of the option may be implied from acts and conduct of the parties, as by taking possession, making improvements, etc.

39 *Cyc.* 1241.

Therefore, if the agreement was not a contract of sale originally, as appellant contends it was, it became such a contract of sale upon the delivery of the personal property to the defendant.

Time of Performance. Appellant's further contention is that the vendee agreed by implication that such operation of the mining claims should be con-

ducted within a reasonable time. No time is fixed by the agreement in terms for performance by the vendee. The rule is that where no time for performance is fixed, the implication is that a reasonable time is intended.

2 *Page on Contracts,* Sec. 1154.

9 *Cyc.* 611.

*Gill Mfg. Co. vs. Hurd,* 18 Fed. 673.

*Hood vs. Hampton Plains Ex. Co.,* 106 Fed. 408.

*Minn. Gas Light Co. vs. Kerr,* 122 U. S. 300, 30 L. Ed. 1190.

Non-Performance. The agreement is dated April 7, 1908, and more than four years had elapsed between the date of the agreement and the commencement of this suit, which, the complaint alleges, is more than reasonable time within which to work the mining claims and the complaint further alleges the neglect of the vendee to mine the premises or to extract gold therefrom, allegations admitted by the demurrer.

## III.

### The Remedy.

Under such a contract, partly executed in the delivery of the personal property and partly executory

for the conveyance of the mining claims and the payment of the balance of the purchase price, there are mutual obligations and rights which cannot be extinguished except by mutual consent.

And, without the consent of the vendor, the vendee will not be permitted to affirm so much of the agreement (which is entire and not severable) as applies to the personal property and as is particularly advantageous to him and to disaffirm and repudiate so much as is, or may turn out to be, burdensome.

Under a contract of sale for real property, for default of vendee, the vendor has a remedy in equity for specific performance and, in the alternative, to foreclose vendee's right of purchase.

39 *Cyc.* 1900, 1994.
*Keller vs. Lewis,* 53 Cal. 114.

We submit the trial court erred in sustaining the demurrer to the complaint and, upon appellant's declining to amend his complaint, in entering final decree and judgment against appellant.

Respectfully submitted,
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Solocitor for Appellant.